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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/720,862

11/24/2003

Timothy J. Taylor

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5172

48995

7590

08/07/2008

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EXAMINER

OGDEN JR, NECHOLUS

ART UNIT

PAPER NUMBER

1796

MAIL DATE

DELIVERY MODE

08/07/2008

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/720,862	<b>Applicant(s)</b> TAYLOR ET AL.	
	<b>Examiner</b> Necholus Ogden, Jr.	<b>Art Unit</b> 1796	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 25 July 2008.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 2,3,5,6,9 and 11-26 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 2-3, 5-6, 9, 11-26 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                     | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 7-25-2008 has been entered.

### ***Response to Amendment***

1. Claims 2-3, 5-6, 9, 11-26 are rejected under 35 U.S.C. 103(a) as obvious over Beerse et al (6,294,186).

Beerse et al disclose an antimicrobial composition that is effective against Rhinoviruses and E-coli bacteria (col. 2, lines 1-10). Moreover, said composition comprises 0.01 to 20% by weight of a benzoic acid analog such as salicylic acid (col. 6, lines 20-33); water as a carrier (col. 9, lines 28-31); alcohol such as dihydric alcohols, isopropanol, ethanol or dipropylene glycol (col. 9, lines 44-55 ); and a pH of 2-4 with sodium hydroxide pH adjusting agents (col. 19, lines 24-35). Note, see examples 4, 12, 14-15, 16-18.

Beerse et al is silent with respect to the log reduction of at least 3 for 30 seconds.

It would have been obvious to one of ordinary skill in the art to expect the compositions of Beerse et al to exhibit efficacy against bacteria with a log 3 reduction for 30 seconds because Beerse et al teach compositions that maintain a log 2 reduction

against viruses for 30 minutes to an hour and the artisan of ordinary skill would expect the compositions of Beerse et al to exhibit a greater reduction in a shorter interval of time, in the absence of a showing to contrary. Moreover, the compositions of Beerse et al teach the same ingredients as claimed for the purpose of making an antimicrobial composition, wherein the artisan of ordinary skill would reasonably expect similar characteristics.

### ***Response to Arguments***

2. Applicant's arguments filed 7-25-2008 have been fully considered but they are not persuasive.

3. Applicant argues that examples 16, 18 and 21 do not suggests the embodiments of Beerse et al that do not require metal acid complex and further some examples suggest antimicrobial agents.

4. The examiner contends that non-preferred embodiments are indicative of obviousness and that the teachings of Beerse et al suggest compositions that do not requires metal-salt complex and further include solvents as claimed in their requisite proportions.

5. *"The use of patents as references is not limited to what the patentees describe as their own inventions or to the problems with which they are concerned. They are part of the literature of the art, relevant for all they contain."* *In re Heck*, 699 F.2d 1331, 1332-33, 216 USPQ 1038, 1039 (Fed. Cir. 1983) (quoting *In re Lemelson*, 397 F.2d 1006, 1009, 158 USPQ 275, 277 (CCPA 1968)).

6. *A reference may be relied upon for all that it would have reasonably suggested to one having ordinary skill the art, including nonpreferred embodiments. Merck & Co. v. Biocraft Laboratories, 874 F.2d 804, 10 USPQ2d 1843 (Fed. Cir.), cert. denied, 493 U.S. 975 (1989). See also > Upsher-Smith Labs. v. PamLab, LLC, 412 F.3d 1319, 1323, 75 USPQ2d 1213, 1215 (Fed. Cir. 2005)*

7. Applicant argues that Beerse et al teach that the addition of a metal-acid complex acts as an additional anti-microbial agent.

8. The examiner contends that applicant's claims are bound by the transitional phrase of "comprising which permits the inclusion of additional components not specified in the claim. Moreover, as stated by applicant", Beerse et al do not require metal-salts in all of the embodiments and specifically suggest that the embodiments free of metal salts are effective in provide residual anti-viral efficacy (col. 47, lines 18-55) Therefore, Beerse et al do not require a metal-salt component as suggested by applicant, and further applicant's claims permit the use of additional ingredients not specified. Accordingly, the skilled artisan would therefore view embodiments without metal salts as permissible in light of the disclosure.

9. Applicant argues that Beerse et al fail to suggest a surfactant having 0 to 0.2%; and 5 to 50% by weight of a hydric solvent.

10. The examiner respectfully disagrees and directs applicant's attention to column 27, lines 55-60, which teaches less than 10% by weight of surfactants are needed. With respect to the hydric solvent, Beerse et al teach that said solvent is present in an amount from 0-95% (col. 9, lines 44-55).

11. Applicant argues that example 21 does not comprise a metal-salt but also does suggest high levels of surfactants.

12. The examiner contends that a reference does not need to teach each of the components in an example to be indicative of obviousness. The general teaching of Beerse et al states that metal –salt complex is not require to perform as suggested (col. 47, lines 18-55). Moreover, Beerse et al teach several embodiments that do not require surfactants (see examples 4, 12, 14-15, 16-18). Accordingly, the claims are not anticipated and therefore specific teachings of preferred embodiments are not strictly adhered to.

13. The Declaration under 37 CFR 1.132 filed 7-25-2008 is insufficient to overcome the rejection of claims 2-3, 5-6, 9, 11-26 based upon Beerse et al as set forth in the last Office action because: Declarant states an opinion of Beerse et al that is not supported by factual evidence which compares the closest prior art of record against the claimed invention.

The examiner contends that criticality cannot be established because applicant has not compared the closes prior art with the claimed invention. Moreover, said comparative examples are not commensurate in scope with the claimed invention or the prior art of record. Whether the unexpected results are the result of unexpectedly improved results or a property not taught by the prior art, the “objective evidence of nonobviousness must be commensurate in scope with the claims which the evidence is offered to support.” In other words, the showing of unexpected results must be reviewed to see if the results occur over the entire claimed range. In re Clemens, 622 F.2d 1029,

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1036, 206 USPQ 289, 296 (CCPA 1980). An affidavit or declaration under 37 CFR 1.132 must compare the claimed subject matter with the closest prior art to be effective to rebut a prima facie case of obviousness. In re Burckel, 592 F.2d 1175, 201 USPQ 67 (CCPA 1979). "A comparison of the claimed invention with the disclosure of each cited reference to determine the number of claim limitations in common with each reference, bearing in mind the relative importance of particular limitations, will usually yield the closest single prior art reference." In re Merchant, 575 F.2d 865, 868, 197 USPQ 785, 787 (CCPA 1978).

Applicant suggests that the rejection is made based on a cherry picking ingredients for support and specifically the statement excluding the metal salt complex.

The examiner contends that the general teaching of Beerse et al states that metal –salt complex is not require to perform as suggested (col. 47, lines 18-55).

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Necholus Ogden, Jr. whose telephone number is 571-272-1322. The examiner can normally be reached on M-Thu.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Harold Pyon can be reached on 571-272-1498. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Necholus Ogden, Jr./  
Primary Examiner  
Art Unit 1796

8-4-2008